United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

MARGARET TOWNSEND,

Plaintiff-Appellee,

-against-

NASSAU COUNTY MEDICAL CENTER, Dr. Donald H. Eisenberg, Superintendent, NASSAU COUNTY CIVIL SERVICE COMMISSION, Gabriel Kohn, Chairman; Edward S. Witanowski, Edward A. Simmons, Adele Leonard, Executive Director of Nassau County Civil Service Commission; NEW YORK STATE DEPARTMENT OF CIVIL SERVICE; Esra H. Posten, President of the NEW YORK STATE CIVIL SERVICE COMMISSION and head of the NEW YORK STATE CIVIL SERVICE DEPARTMENT,

Defendants-Appellants.

----------X

BRIEF FOR PLAINTIFF-APPELLEE

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STATEMENT OF THE CASE

Plaintiff brought suit against the named defendants alleging inter alia a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e) et seq. in that the plaintiff had been terminated from her position as a Provisional Medical Technologist I at the Nassau County Medical Center and subsequently demoted to the position of Provisional Laboratory Technician II at the Nassau County Medical Center because she did not possess a college degree, an eligibility requirement imposed some years after she began her employment. The action was dismissed as to the state defendants and a motion for a preliminary injunction was subsequently denied. The case went to trial before the Court (Hon. Jack B. Weinstein)without a jury on

September 22-24, 1975. The Court by a memorandum and order dated December 8, 1975, granted to the plaintiff against the County defendants the relief requested in the complaint. Final judgment was entered in the case by the Court on February 27, 1976 (A. 331-332).

There are certain inaccuracies in the Appellant's Statement of Facts. Appellant indicates that "Respondent failed the examination, [referring to the Civil Service Examination given December 4, 1971] having passed only that part of the examination dealing with blood banking (A. 371)." (Appellant's Brief, p. 3). Plaintiff's Exhibit 14 (A. 371) was evidence of plaintiff's score on a Federal examination given by the Department of HEW (A. 271). The exhibit was introduced to help demonstrate plaintiff's ability to pass a relevant

examination. The Court indicated that there was no question that the plaintiff was competent in blood banking (A. 275).

Appellant indicates (on p. 4 of its brief) that Respondent was discharged on December 31, 1973, with three other provisional medical technologists I, all of whom were white. There is no evidence in the record to substantiate that statement, and Respondent submits that it is not a true statement.

Also, it should be noted that in order to obtain ASCP certification, it is necessary to have a Bachelor's degree (A. 102).

Appellant's insistance on the Medical Technologist I specification covering a variety of laboratory jobs is misleading inasmuch as the evidence showed that all laboratory personnel at Nassau County

Medical Center work in only one laboratory (A.153).

Finally, it should be noted that Nassau County only gave "grandfather" treatment to current employees for one examination (Def. Exhibit E) .

ARGUMENT

POINT I

THE COURT CORRECTLY FOUND THAT RESPONDENT HAD PROVEN A PRIMA FACIE CASE OF RACIAL DISCRIMINATION.

An employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a college diploma as a condition of employment when the college degree requirement is not shown to be significantly related to successful job performance, and when the requirement operates against blacks at a substantially higher rate than whites. Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Court in Griggs found a violation despite no showing of intent to discriminate on the part of the employer:

> "We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or

> absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.
>
> The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through company financing of two thirds the cost of tuition for high school training. But Congress directed the thrust of the act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." Griggs, supra at p. 432. (Emphasis in the original.)

The issue to be determined is not whether or not a degree requirement would apply equally as against whites and blacks who do not have a degree but whether or not the selection procedure operates unequally

against blacks as a group. As stated in Chance v. Board of Examiners, 458 F. 2d 1167 (2nd Cir. 1972):

> "Conceededly this case did not involve intentionally discriminatory legislation, cf. Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) or even a neutral legislative scheme applied in an intentionally discriminatory manner, see Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886). Nonetheless, we do not believe that the protection afforded racial minorities by the 14th Amendment is exhausted by those two possibilities. As already indicated, the District Court found that the Board's examinations have a significant and substantial discriminatory impact on black and Puerto Rican applicants. That harsh racial impact, even if unintended, amounts to an invidious de facto classification that cannot be ignored or answered with a shrug. At the very least, the constitution requires that state action spawning such a classification 'be justified by legitimate state considerations.'" Chance, supra, at pp. 1175-1176.

Mr. Justice Clark's opinion in Kennedy Park Homes Association v. City of Lackawanna, 436 F. 2d 108, 114 (2nd Cir. 1970), cert. den. 401 U.S. 1010 (1971) is quoted in Chance, supra, at p. 1176:

> "'Even if we were to accept the city's allegation that any discrimination here resulted from thoughtlessness rather than a purposeful scheme, the city may not escape responsibility for placing its black citizens under a severe disadvantage which it cannot justify.'"

Again, it is important to emphasize that intent is not important:

> "[C]ourts have held that an employee challenging an employment practice as discriminatory need not prove a purpose on the employer's part to discriminate; the only intent requirement is that the employer consciously perform the allegedly discriminatory act. Thus, it has been expressly held, and we agree that efforts to recruit minority members have no bearing on the showing that an employment

> practice has a racially disproportionate impact. Although the department, quite commendably has succeeded in increasing the proportion of black officers through vigorous efforts, it is self evident that use of selection procedures that do not have a disparate effect on blacks would have resulted in an even greater percentage of black police officers than exists today." Davis v. Washington, 512 F. 2d 956, 961 (5th Cir. 1975).

In addressing itself to an issue similar to that confronting the Court in this case the Court in Johnson v. Goodyear Tire and Rubber Co. Synthetic Rubber Plant, 491 F. 2d 1361 (5th Cir. 1974) stated at page 1371:

> "Goodyear had never attempted to validate its high school diploma criterion. Once it has been established that the diploma barrier has an adverse consequence on potential black employees, the failure of the employer

> to validate his educational prerequisite, compels the conclusion that it is invalid."

Good faith is not a defense in the use of non-validated tests in educational requirements. Duhon v. Goodyear Tire and Rubber Co., Beaumont Plant, 494 F. 2d 817, 819 (5th Cir. 1974). Indeed, in each of the leading discrimination cases decided in this Circuit, there was no evidence of past, purposeful discrimination. Chance, supra; Vulcan Society of New York City Fire Department v. Civil Service Commission, 490 F. 2d 387 (2nd Cir. 1973); Bridgeport Guardians, Inc., v. Bridgeport Civil Service Commission, 482 F. 2d 1333 (2nd Cir. 1973); Kirkland v. New York State Department of Correctional Service, 520 F. 2d 420 (2nd Cir. 1975)

Once there has been a showing of a racially disproportionate impact with respect to a job requirement, that "puts

on the municipal or state defendants not simply a burden of going forward but a burden of persuasion." Vulcan Society of New York City Fire Department v. Civil Service Commission, 490 F. 2d 387, 393 (2nd Cir. 1973) (Friendly, J.) aff'g 360 F. Supp. 1265 (S.D.N.Y. 1973).

The case of Gresham v. Chambers, 501 F. 2d 687 (2nd Cir. 1974) cited by the Appellant is inapposite. In Gresham the Court discussed the possible applicability of affirmative action as a remedy where a pattern of past discrimination appeared. However, as indicated above, in order to determine whether or not Title VII has been violated, past, purposeful discrimination need not be shown. In Gresham the Court pointed out that the relevant statistical evidence that had been introduced at trial was insufficient to

spell out discrimination inasmuch as there was a higher percentage of black faculty members at Nassau Community College than in the population, and accordingly affirmed the denial of the granting of a preliminary injunction. In short, Gresham is a totally different case from the case at bar.

The Appellant's citation to the District Court decision of Badillo v. Dallas City Community Action Com., Inc., 394 F. Supp 694 (ND Tex 1975) is similarly unpersuasive. The law in this Circuit is not as stated in the Texas District Court opinion, with respect to the necessity of "plus factors" in addition to statistics in proving a prima facie case. In any event, as the opinion indicates, it is contrary to the authority of its own Circuit. 394 F. Supp at 706. See Rodriquez v. East Texas Motor Freight, 505

F. 2d 40, 53 ("A prima facie case of discrimination may be established by statistical evidence, and statistical evidence alone.").

Sufficient statistical evidence was introduced for the purpose of showing a disparate racial impact, and accordingly the burden of persuasion to show that the college degree requirement was valid shifted to the defendants. Kirkland v. New York State Department of Correctional Services, 520 F. 2d 420 (2d Cir. 1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F. 2d 1333 (2d Cir. 1973). In Bridgeport, supra, the Court rejected the application of the customary "rational relationship" test of the 14th Amendment once a de facto case of discrimination had been established. Bridgeport, supra at 1336. The prima

facie case of discrimination had been established by showing a disparity in a passing rate on an examination for blacks as opposed to whites. In the instant case the disparity had to do with the percentage of blacks achieving college degrees, which is the particular requirement being challenged in this case and which is to be treated as an examination or a test for purposes of determining whether or not it is valid. 29 CFR 1607.2. The first circuit uses the description "racially disproportionate impact" as to what the plaintiff must show in order to shift the burden of persuasion as to the validation of the test, as opposed to the phrase "prima facie case of racial discrimination." Boston Chapter NAACP v. Beecher, 504 F. 2d 1017 at 1020 (1st Cir. 1974).

The Court in Boston Chapter NAACP v. Beecher, supra, also found no

error in the District Court's reliance on statistics pertaining to the city proper rather than to metropolitan regions. Boston Chapter NAACP, supra, at p. 1020, n. 4. In Griggs, supra, the racially disproportionate impact of a high school diploma requirement was demonstrated by the use of North Carolina census statistics. Griggs, supra, at p. 853 n. 6. In Johnson v. Goodyear Tire and Rubber Co., Synthetic Rubber Plant, supra, 491 F. 2d 1364, 1371 n. 10 (5th Cir. 1974) census statistics were used to show the disparate racial impact on Texas blacks of a high school diploma requirement.

The cases cited by the Appellant with respect to the type of statistics suitable in a Title VII case are totally inapposite. In Keely v. Westinghouse Electric Corp., 404 F. Supp 573 (E.D.Mo.

1975) the statistics were found insufficient because they came from a "small universe" of a company employing 34 persons. Rich v. Martin Marietta Corp., 522 F. 2d 333(10th Cir. 1975) dealt with the fact that the defendant had introduced their irrelevant statistics. Taylor v. Safeway Stores, Inc., 524 F. 2d 263 (10th Cir. 1975) indicated in dicta that it was appropriate to use statistics of a particular branch of a company where discrimination in that branch was in issue. In Olson v. Philco Ford, F. 2d 11 E.P.D. 10, 730 (February 27, 1976) Olson had claimed she was discriminated against with respect to promotion. She introduced statistics on the work force of the company in general, but failed to introduce statistics with respect to promotion. Jones v. New York

City Human Resources Administration, 528 F. 2d 696 (2nd Cir. 1976) was an affirmance of a case wherein a civil service examination was found to be discriminatory.

POINT II

THE COUNTY FAILED TO SHOW THE JOB RELATEDNESS OF THE COLLEGE DEGREE REQUIREMENT.

The College Degree Requirement.

In the instant case absolutely no evidence of validation of the degree requirement was presented as mandated by the EEOC guidelines on employment testing procedures issued July 21, 1970, and endorsed in Griggs, supra, and in Albermarle Paper Co. v. Moody, 95 S. Ct. 2362 (1975). This is particularly so in view of the fact that Townsend as well as others were satisfactorily performing the jobs of Med. Tech. I and even of Med. Tech. III despite the fact that they did not have college degrees. See United States v. Jacksonville Terminal Co., 451 F. 2d 418, 456 (5th Cir. 1971), United States v. Georgia Power Co., 474 F. 2d 906, 918 (5th Cir. 1973); Brito v.

Zia Co., 478 F. 2d 1200, 1205 (10th Cir. 1973); Petway v. American Cast Iron Pipe Co., 494 F. 2d 211, 221-222, 222 n. 24 (5th Cir. 1974).

As stated by the Supreme Court in Griggs:

> "History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the common sense proposition that they are not to become masters of reality."
> 401 U.S. at 433.

> "The evidence, however, shows that employees who have not completed high school or taken the test have continued to perform satisfactorily and make progress in the departments for which the high school and test criteria are now used." Griggs, supra at pp. 431, 432.

Specifically, in the instant case not only was it shown that Margaret Townsend

performed satisfactorily in the position of Med. Tech. I and as supervisor of the blood bank, but it was also indicated that there are individuals such as Jean Milson and AlScimeca who hold the title of Med. Tech. III, but who do not possess college degrees; the record also indicates that George Davis, former supervisor of the blood bank, did not have a college degree. In addition, at the time the Nassau County Board of Supervisors granted permission for people to take the examination even though they did not have a college degree, it certainly had to be conceded that a college degree would not be necessary for the job.

In validating a degree requirement the fact that the requirement is desirable has no relevance. The requirement must be necessary.

> "At best the only justification for this requirement is the obvious eventual need for above average ability to read and comprehend the increasingly technical maintenance manuals, the training bulletins, operating instructions, forms and the like demanded by the sophisticated industry....In such a context, the high school education requirement cannot be said to be reasonably related to job performance. This is not to say that such requirements are not desireable....it simply means that the 'diploma test' cannot be used to measure the qualities. Many high school courses needed for a diploma (History, literature, physical education, etc.) are not necessary for these abilities. A new reading and comprehension test... might legitimately be used for this job need." United States v. Georgia Power Co., 474 F. 2d 906, 918 (5th Cir. 1973).

Cf. United States v. Georgia Power Co., supra at page 918, nn. 14 and 15.

It is no answer to the defendant's inability to demonstrate job relatedness

that they are attempting to upgrade the position:

> "The law makes it impermissible to require such an educational requirement unless it is job-related or a bonafide business necessity; it is not sufficient, as the defendant company contends, merely to maintain a high quality of personnel or to ease advancement." Roman v. Reynolds Metals Co., 368 F. Supp. 47, 50 (S.D. Texas 1973).

The EEOC gives specific guidance in the area of test validation. The EEOC Guidelines, Title 29 C.F.R. Section 1607.2 defines "test" to include specific educational requirements. Discrimination is defined pursuant to 1607.3:

> "The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by Title VII constitutes discrimination unless: a) the test has been validated and evidences

a high degree of utility as hereinafter described, and b) the person giving or acting upon the results of a particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use."

Pursuant to Section 1607.4(c)

"Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."

Section 1607.5 in describing minimum standards of validation states:

"(a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion related validity such as those described in 'Standards for Educational

and Psychological Tests and Manuals' published by American Psychological Association, 1200 17th Street, N.W., Washington, D.C. 20036. Evidence of content or construct validity as defined in that publication, may also be appropriate where criterion validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analysis to demonstrate the relevance of the content (in the case of job knowledge or proficienty tests) or the construct (in the case of trait measures). Evidence of content validity alone may be acceptable for well developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behavior contemplated here do not include those which can be acquired in the brief orientation to the job."

Judge Weinfeld has summarized the "generally accepted methods of establishing the job-relatedness or 'validity' of

employment examinations." Vulcan, supra, 360 F. Supp. 1265, 1273 (S.D.N.Y. 1973). In speaking of criterion validation Judge Weinfeld states (at p. 1273):

> "The preferred method of test validation is criterion-related or empirical validity, which includes what are referred to as the predictive and concurrent methods of validation. Predictive validation consists of a comparison between the examination scores and the subsequent job performance of those applicants who are hired. If there is a sufficient correlation between test scores and job performance, the examination is considered to be a valid or job-related one. Concurrent validation requires the administration of the examination to a group of current employees and a comparison between their relative scores and relative performance on the job. Experts called by both sides agreed that this method is less desirable than predictive validation because of the possibility that some distortion may

result from either the experience or lack of motivation of the current employees who participate in the examination for experimental purposes. Nevertheless concurrent validation has its uses because in the absence of an examination which has been used and predictively validated in the past, it is the only method empirically determining whether an examination adequately assesses what it is intended to assess prior to its administration to actual job applicants."

Judge Weinfeld also describes content validation:

"Content validation is less preferable than the criterion-related methods of test validation but nevertheless a professionally accepted means of establishing job-relatedness where the more desirable empirical methods are impractical. An examination has content validity if the content of the examination matches the content of the job. For a test to be content valid, the aptitudes and skills required for successful examination performance must be those

> aptitudes and skills required for successful job performance. It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job." Vulcan, supra, 360 F. Supp. 1265, 1274 (S.D.N.Y. 1973).

The final method of validation, construct validation, is described by Judge Friendly:

> "As noted in Bridgeport Guardians, supra, 482 F. 2d at 1337-1338, "construct validity" requires identification of general mental and psychological traits believed necessary to successful performance of the job in question. The qualifying examination must then be fashioned to test for the presence of these general traits. To design a 'construct valid' test for typists, the examiners would first determine that a typist's job requires, for instance, the ability to concentrate, perseverance and attention to detail. Assuming that the identification of necessary traits was accurate, an examination that properly tested for those traits would have construct validity."

Vulcan, supra, 490 F. 2d 387, 395 (2nd Cir. 1973).

It is apparent from examining the evidence submitted by the defendants with respect to validation, that there was absolutely no empirical data introduced to demonstrate validity pursuant to any of the generally accepted validation methods. This failure on the part of the defendants to show the job-relatedness of the college degree requirement is fatal to their case. Cresap, McCormick and Paget Survey. (Plaintiff's Exhibit 9).

Any attempt by the defendants to characterize the Cresap, McCormick and Paget survey done by Nassau County in June, 1966, and the interviews and questionnaires employed in connection therewith, as the kind of validation required under the law must be dismissed as being frivolous. The Cresap, Paget survey together with the covering letter of the firm dated June 23, 1966, clearly indicated that the

nature of the survey was to analyze salaries paid for various jobs in Nassau County and to reclassify jobs where necessary so as to ensure that employees were paid a fair salary commensurate with the nature of the work thay they were doing. Nowhere in the survey or in the testimony that was introduced by the defendants is there any indication that there was any attempt whatsoever to validate, as that term is professionally used, the qualification requirements for any of the jobs, and specifically the college degree requirements for Medical Technologist I. Furthermore, although the "Introduction" of the Cresap report (introduced in evidence by the plaintiff) indicates that other studies made of the personnel administration for Nassau County consisted of the "reclassification of the Civil Service

employees in a classified service" and that that "portion of the study included the preparation of a complete and revised set of class specifications", there was never any testimony as to how the qualifications which were placed in the specifications were determined to include a college degree for the position of Medical Technologist I, other than the testimony that supervisors were asked whether in their opinion a college degree was required. Again, it must be respectfully pointed out that such a procedure cannot possibly be considered validation as the term is defined in professional circles. Finally, the fact (which we do not concede) that New York City requires a college degree for a similar position is not validation within the context of the cases and the EEOC guidelines.

Spurlock v. United Airlines, Inc., 475 F. 2d 216 (10th Cir. 1972) and Hodgson v. Greyhound Lines, Inc., 499 F. 2d 859 (7th Cir. 1974) cited in appellant's brief are inapposite to the case at bar in that in this case there is absolutely no question that appellee is qualified to do the job of Medical Technologist I. See McDonald Douglas Corp. v. Green, 411 U.S. 792 (1973). Appellant attempts to distinguish this case from Berger v. Board of Psychologists Examiners, 521 F. 2d 1056 (DC Cir. 1975). However, the cases are strikingly similar. Appellee had been a blood bank specialist for 12 years and had been in the Nassau County Medical Center for over 10 years. Although she was "grandfathered" in and permitted one attempt at taking a test, despite the fact that she did not have a college degree, the

"grandfathering" treatment was terminated thereafter, and she was not permitted to take additional examinations. The District Court in relying upon Berger, supra, stated "[I]f the right of a current, qualified practitioner to maintain his or her employment cannot be distinguished by statute, it follows a fortiori that such a result may not be accomplished by regulations which conflict with statutory policies against racial discrimination."(emphasis in original) A307.

POINT III

TO THE EXTENT IT WAS NECESSARY FOR THE COURT BELOW TO IGNORE PROVISIONS OF THE NEW YORK STATE CIVIL SERVICE LAW, THE COURT ACTED PROPERLY IN PROTECTING THE PLAINTIFF'S CONSTITUTIONAL AND FEDERAL RIGHTS, IN ACCORDANCE WITH THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

In order to effectuate Title VII of the Civil Rights act of 1964, a federal court may override state Civil Service law. United States Constitution, Article VI, cl. 2.

The County's use of a quotation from Kirkland v. New York State Department of Correctional Services, 520 F. 2d 420 (2d Cir. 1975) is inapposite. In Kirkland, the District Court had ordered that at least one black or Hispanic be promoted for each three white employees until the combined percentage of black and Hispanic Sergeants was equal to the combined percentage of black and Hispanic correction officers. The Court of Appeals had occasion (at p. 429) to discuss the concept of reverse discrimination in reversing that part of the District Court's order which provided for the establishment of a quota. Clearly, in this case involving only one plaintiff, the language quoted by the County is not relevant.

POINT IV

THE DISTRICT COURT PROPERLY AWARDED BACK PAY TO THE PLAINTIFF

It was clearly appropriate to award the plaintiff back pay in the instant case in

order to further the objectives of Title VII and to make the plaintiff whole. Albermarle Paper Co. v. Moody, 422 U.S. 405, 95 S. Ct. 2362 (1975).

The Court stated in Albermarle,:

> "And where a legal injury is of economic character,
>
> > '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the inj . The latter is the standard by which the former is to be measured. The injured party is to be placed as near as may be, in the situation he would have occupied if the wrong had not been committed.' Wicker v. Hoppock, 6 Wall. 94, at 99, 18 L.Ed. 752
>
> "The 'make whole' purpose of Title VII is made evident by the legislative history". Albermarle, supra 95 S. Ct. at 2372.

The Court indicated that good intentions were immaterial:

> "This [absence of bad faith]

is not a sufficient reason for denying back pay. Where an employer has shown bad faith -- by maintaining a practice which he knew to be illegal or of highly questionable legality -- he can make no claims whatsoever on the Chancellor's conscience. But, under Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor. If back pay were awardable only upon the showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for worker's injuries. This would read the 'make whole' purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith'. Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the act to the consequences of employment practices, not simply the motivation.' Griggs v. Duke Power Co." Albermarle, supra 95 S. Ct. at p. 2374. (emphasis in original).

Day v. Matthews, F. 2d , 11 E.P.D. paragraph 10, 725 (D.C. Cr., Feb. 23,

1976) relied upon by the County was an action against the Secretary of the United States Department of Health, Education, and Welfare wherein the Court stated that the employer bears the burden of proof to show that the employee's qualifications were such that the employee would not have been selected, even in the absence of discrimination. The County's reliance on Day is misplaced, inasmuch as in the case at bar, it was shown that but for a degree requirement that operated against blacks in a disparate manner and which was not shown to be job related, the plaintiff would have had the position.

POINT V

THE DISTRICT COURT PROPERLY AWARDED ATTORNEYS FEES TO THE PLAINTIFF

In Newman v. Piggy Park Enterprises, 390 U.S. 400, 88 S. Ct. 964 the Supreme Court held that attorneys fees should "ordinarily" be awarded in all but "special circumstances"

to plaintiffs successful in obtaining injunctions against discrimination in public accomodations under Title II of the Civil Rights Act of 1964. The Court determined that the great public interest in having injunctive actions brought could be vindicated only if successful plaintiffs acting as "private attorneys general" were awarded attorneys fees in all but very unusual circumstances.

The Supreme Court stated in Albermarle Paper Co. v. Moody, supra:

> "There is of course an equally strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices... [T]his interest can be vindicated by applying the Piggy Park standard to the attorneys fees provision of Title VII, 42 USC Section 2000 e-5(k), see Northcross v. Board of Education, 412 U.S. 427, 428, 93 S. Ct. 2201, 2202, 37 L. Ed. 2d 48." Albermarle, supra, at p. 2370.

It is respectfully submitted that in the case at bar there are no special circumstances presented that would bar an award of attorneys fees.

CONCLUSION

For the reasons above stated, the order and judgment appealed from should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARGARET TOWNSEND,

Plaintiff

against

NASSAU COUNTY MEDICAL CENTER, et al,

Defendant

Index No. 76-7003

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NASSAU *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
130 Jerusalem Avenue, Hempstead, New York 11550

That on the 20th *day of* May, *19* 76 *deponent served the annexed*
BRIEF FOR PLAINTIFF-APPELLEE

on the County Attorney of Nassau County
attorney(s) for
in this action at 1 West Street, Mineola, New York 11501
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me
this 20th *day of* May, *19* 76

Geraldine Moore
The name signed must be printed beneath

GERALDINE MOORE

TANYA McDOUGALD
NOTARY PUBLIC, State of New York
No. 31-4514834
Qualified in Nassau County
Commission Expires March 30, 1977

Tanya McDougald